Supreme Court, U.S.
FILED
DEC 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5551

In the Supreme Court of the United States

OCTOBER TERM, 1990

EDWARD HAROLD SCHAD, JR., PETITIONER

v.

STATE OF ARIZONA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The United States will address the following question:

Whether the reasonable doubt standard required that the jury agree on the type of first degree murder that petitioner committed.

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INTEREST OF THE UNITED STATES

This case presents the question whether, when a criminal statute provides alternative means of committing an offense, the jury must unanimously agree on the means used by the defendant before it can convict. A number of federal criminal statutes set forth alternative ways of committing a particular offense. In fact, the federal first degree murder statute, like the Arizona statute at issue in this case, defines first degree murder to include both premeditated homicide and homicide committed in the perpetration of certain felonies. 18 U.S.C. 1111. The Court's disposition of the first question presented will therefore affect federal cases arising under Section 1111 as well as other statutes that provide more than one way of committing an offense.

STATEMENT

1. On August 1, 1978, Lorimer "Leroy" Grove, a 74-year-old man, left his home in Bisbee, Arizona, to visit his sister in Washington State. He was driving his new Cadillac automobile and towing a camper. J.A. 30; *State* v. *Schad,* 129 Ariz. 557, 561, 633 P.2d 366, 370 (1981), cert. denied, 455 U.S. 983 (1982). On August 9, 1978, Grove's badly decomposed corpse was found in underbrush off U.S. Highway 89, about nine miles south of Prescott, Arizona. When his body was discovered, there was a rope around his neck; it was determined that he had died by strangulation. J.A. 30-31; *State* v. *Schad,* 129 Ariz. at 561, 633 P.2d at 370.

Two days after Grove left on his trip, Arizona police discovered, also off Highway 89, a rental car that petitioner had rented for a weekend in December 1977 and never returned. The car contained several items that were later identified as belonging to Grove, including one that Grove had probably taken on his trip, a mirror device that he used for coupling his camper to his car. J.A. 31; *State* v. *Schad,* 129 Ariz. at 561, 633 P.2d at 370.

The following month, petitioner was stopped in New York for speeding. He was driving Grove's Cadillac when he was stopped. He told the New York State police officers that he had no proof of registration for the car because the car belonged to an elderly friend named Larry Grove. J.A. 31; *State* v. *Schad,* 129 Ariz. at 561, 633 P.2d at 370.

Petitioner was later arrested in Utah for parole violation; at the time of his arrest, he was still in possession of Grove's Cadillac. A search of the car revealed personal belongings of Grove's, and a search of petitioner's wallet yielded two credit cards in Grove's name, which petitioner had begun using on August 2, 1978, the day after Grove

left on his trip, and the day before petitioner's abandoned rental car was found near the same Arizona highway where Grove's body was later discovered. J.A. 31; *State* v. *Schad,* 129 Ariz. at 561, 633 P.2d at 370; Pet. Br. 4. While in custody, petitioner told an associate that he would "deny being in any area of Arizona, * * * particularly Tempe, Arizona, and Prescott, Arizona." J.A. 33.

Petitioner gave several conflicting accounts of how he came into possession of Grove's car and personal belongings. In testimony at his first trial, petitioner admitted that all his prior accounts were false. He then testified that he obtained Grove's car at a truck stop in Phoenix, Arizona, where he got it by trading the rental car that he had stolen to a couple from France. Efforts by Arizona officials to confirm the existence of the French couple proved unsuccessful. *State* v. *Schad,* 129 Ariz. at 570-571, 633 P.2d at 379-380.

2. Petitioner was indicted on one count of first degree murder. The Arizona statute applicable to petitioner's case defined first degree murder as "murder which is willful, deliberate, or premeditated killing, or which is committed * * * in the perpetration of, or attempt to perpetrate, * * * robbery." Ariz. Rev. Stat. Ann. § 13-452 (1959 & Supp. 1973).[1]

3. Petitioner was convicted and sentenced to death. His conviction was affirmed on direct review, *State* v. *Schad,* 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983 (1982), but it was set aside on collateral attack because the trial court failed to instruct the jury on the elements of the felonies underlying the State's felony-

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[1] The Arizona statutes defining and punishing murder were revised in 1978, but the first degree murder statute still reaches both premeditated murder and felony murder. See Ariz. Rev. Stat. Ann. § 13-1105.A (1989).

murder theory (robbery and kidnapping). *Schad* v. *State*, 142 Ariz. 619, 691 P.2d 710 (1984).

4. Petitioner was retried and again convicted of first degree murder and sentenced to death. The Arizona Supreme Court affirmed his conviction and sentence. J.A. 30-55.

a. At the second trial, the court instructed the jury that "[f]irst degree murder is murder which is the result of premeditation" and that "[m]urder which is committed in the attempt to commit robbery is also first degree murder." J.A. 26. The court further instructed that the jury's verdict must be unanimous: "All 12 of you must agree whether the verdict is guilty or not guilty." J.A. 27. Petitioner did not request, and the judge did not give, an instruction that the jury had to agree on the type of first degree murder – premeditated murder or felony murder – that petitioner committed.

b. In affirming petitioner's conviction, the Arizona Supreme Court rejected petitioner's argument that jury unanimity was required with respect to the type of first degree murder that petitioner committed. The court explained:

> In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. Although a defendant is entitled to a unanimous verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.

J.A. 41 (quoting *State* v. *Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982) (citations omitted)).

SUMMARY OF ARGUMENT

The Due Process Clauses of the Fifth and Fourteenth Amendments require proof beyond a reasonable doubt of each fact "necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The facts necessary to constitute a crime are those set forth as essential elements of proof in the statute that defines the crime. Arizona's first degree murder statute permits the offense to be established through proof that the defendant caused death in one of several ways, including either with premeditation or in the course of a robbery. Although the jurors were not told that they had to be unanimous as to the particular way petitioner committed the offense, petitioner's conviction satisfied the requirements of due process because each juror found every element necessary to establish the crime of first degree murder. That is, all 12 jurors found beyond a reasonable doubt that the victim's death occurred either as a result of premeditated homicide or in the course of the commission of a robbery, which is precisely what the Arizona offense of first degree murder requires.

Petitioner argues that premeditated murder and felony murder must be seen as "conceptually distinct" offenses. Where a statute contains such distinct offenses, he argues, the jury may not properly convict unless all 12 jurors agree that the defendant committed premeditated murder or all 12 agree he committed felony murder.

That argument is seriously flawed. Under Arizona law, premeditated murder and felony murder are considered alternative means of committing a single offense, and there is no constitutional ground for challenging that characterization. While the Due Process Clause requires that the jurors find all the elements of the offense to be proved beyond a reasonable doubt, there is no due process princi-

ple that requires the jurors to agree on a single theory of liability. As long as the jurors agreed, beyond a reasonable doubt, that petitioner engaged in conduct that the Arizona legislature characterized as first degree murder, nothing in the Constitution bars his conviction of that crime, even though the jurors may have followed different routes to reach their verdict.

ARGUMENT

PETITIONER'S CONVICTION SATISFIED DUE PROCESS BECAUSE THE JURY AGREED THAT ALL THE ELEMENTS OF FIRST DEGREE MURDER WERE PROVED BEYOND A REASONABLE DOUBT

Petitioner contends (Pet. Br. 14-20) that to convict him of first degree murder the jurors were required to agree on which type of first degree murder he committed—premeditated murder or felony murder. In our view, the Constitution imposes no such requirement.[2]

1. In Arizona, as in every other State and in the federal system, first degree murder is defined by statute. Arizona's first degree murder statute, Ariz. Rev. Stat. Ann. § 13-452 (1959 & Supp. 1973), defines a single offense that may be committed in a number of ways. In that respect, Arizona's statute resembles those of other States and the federal government. See *Tison* v. *Arizona*, 481 U.S. 137, 151-155 (1987) (surveying state statutes); 18 U.S.C. 1111; see also *Whalen* v. *United States*, 445 U.S. 684, 711 n.6 (1980) (Rehnquist, J., dissenting) (statute enacted by Congress for the District of Columbia "defines only one offense, murder in the first degree, which can be committed in any number of ways").

[2] We will not address petitioner's contention (Pet. Br. 10-14) that under the Sixth Amendment, as that provision applies to the States through the Fourteenth Amendment, jury unanimity is required in state criminal trials for capital offenses. For the sake of simplicity, references to jury agreement or unanimity hereafter will refer to agreement or unanimity by the requisite proportion of the jury.

The ways that first degree murder can be committed under the Arizona statute include causing death by premeditated killing and committing certain felonies that result in death. As construed by the Arizona Supreme Court, first degree murder is "only one crime," regardless of which of the several means of committing the offense the defendant has employed in a particular case. J.A. 41; *State* v. *Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982); *State* v. *Axley*, 132 Ariz. 383, 646 P.2d 268 (1982).

There is no basis for any constitutional objection to Arizona's decision to treat premeditated murder and felony murder as different means of committing the same offense. Arizona's first degree murder statute embodies a legislative judgment that a murder committed with the purpose of causing death and a murder committed while carrying out the intent to rob are legally and morally equivalent.[3] That judgment has deep roots in legal tradition:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the vic-

[3] See *State* v. *Serna*, 69 Ariz. 181, 188, 211 P.2d 455, 459 (1949):

> The attempt to perpetrate the crime of robbery * * * during which a homicide is committed, takes the place of and amounts to the legal equivalent of such deliberation, premeditation, and design, which were otherwise necessary attributes of murder in the first degree.

> tim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified [such] behavior * * * along with intentional murders.

Tison v. *Arizona*, 481 U.S. at 157.

Due process principles require the jury to find all the elements of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). But because there is no constitutional bar to making premeditated murder and felony murder alternative means of committing first degree murder, due process did not require the jurors in this case to agree on whether petitioner committed the crime of first degree murder by premeditation or by participating in the robbery that resulted in Grove's death. It was enough that the jurors agreed that petitioner committed the crime of first degree murder, as defined in the statute. By agreeing on that point, the jurors unanimously found beyond a reasonable doubt every fact necessary to convict petitioner of the crime with which he was charged.

2. The rule against duplicity bars the joining of two or more separate offenses in a single count of an indictment or information. See 1 C. Wright, *Federal Practice and Procedure* § 142 (2d ed. 1982). The rule is designed in part to guard against the risk "that a jury may find the defendant guilty on a count without having reached a unanimous verdict on the commission of a particular offense." *United States* v. *UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); see also *Russell* v. *United States*, 369 U.S. 749 (1962); *United States* v. *Zeidman*, 540 F.2d 314, 317 (7th Cir. 1976). The predicate for applying the rule against duplicity – a finding that the two allegations in a single count constitute separate offenses –

presents a question of statutory interpretation. See *UCO Oil*, 546 F.2d at 836-838; *Zeidman*, 540 F.2d at 317.[4] As explained above, the Arizona Supreme Court has decided that question: petitioner's conviction was based on a count that charged a single offense. That determination forecloses petitioner's challenge to the verdict on the ground that the jury may not have agreed on the elements of the crime charged:

> Once it is determined that the statute defines but a single offense, it becomes proper to charge the different means, denounced disjunctively in the statute, conjunctively in each count of the indictment. It is not a valid objection * * * that the jury, in arriving at a unanimous verdict, may not agree on the means by which the offense was committed.

UCO Oil, 546 F.2d at 838.

3. Petitioner does not dispute that he was charged with, and convicted of, a single offense, nor does he dispute that each juror found beyond a reasonable doubt that he committed that offense. Instead, he contends (Pet. Br. 17) that, even with respect to a single offense, the Due Process Clause requires "the unanimous agreement of the jurors upon some version of the facts which comprises every element of the * * * offense."

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[4] The same is true of the analogous question whether a defendant has improperly suffered multiple punishments under a multiplicitous indictment. *Bell* v. *United States*, 349 U.S. 81 (1955); see also *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1978) ("allowable unit of prosecution" for purposes of determining "scope of protection afforded by a prior conviction or acquittal" under Double Jeopardy Clause "depends on * * * congressional choice"); *Whalen* v. *United States*, 445 U.S. 684, 688-690 (1980) (in rejecting Double Jeopardy Clause challenge to consecutive sentences for rape and rape-felony murder in single proceeding under D.C. statute, congressional intent was "dispositive").

Under petitioner's theory, there is no logical stopping point to the insistence on jury agreement. That is clear from petitioner's assertion (Pet. Br. 18) that the jury must unanimously reject every "possible factual scenario" suggested by the evidence in a particular case. Thus, under petitioner's theory, the jury apparently must be unanimous not only as to the means by which the statutory offense was committed, but even as to the details of the crime. Such a requirement, however, would not promote the interests served by the reasonable-doubt standard. Focusing as it does on the means of committing the crime rather than on whether the crime was committed, petitioner's approach would not reduce the risk of an erroneous conviction. See *In re Winship*, 397 U.S. at 363. Nor is petitioner's approach necessary to assure the community that innocent persons are not being condemned. *Id.* at 364. As long as the jury is required to find, beyond a reasonable doubt, that the defendant committed the crime charged, there can be no legitimate complaint that public confidence in the verdict is eroded by the jury's possible lack of agreement on the theory of liability or certain details of the crime. Rather, the effect of adopting petitioner's requirement of unanimity on legal theory and "factual scenario" would be to risk the unwarranted discharge of a defendant where the jury was confident and unanimous that he had committed the crime, but divided or uncertain as to exactly how he did it.

This point can be illustrated by the following hypothetical case. Suppose a state statute makes it unlawful to commit murder by drowning, strangulation, or poisoning, and the defendant seeks to kill his victim by all three methods. Suppose further that the evidence is clear that the defendant committed the murder, but unclear as to which of the defendant's efforts actually caused the victim's death. In that setting, it would be senseless to insist that the jury

be unanimous as to whether the victim died of drowning, strangulation, or poisoning before the jury could convict the defendant of a crime that all 12 jurors were firmly convinced he committed.

The same analysis applies here. The policies of the Due Process Clause, as embodied in the reasonable-doubt standard, are fully served as long as the jurors agree that the evidence has established the defendant's guilt of the offense defined by the legislature; it is immaterial that the jurors may follow different routes to reach that conclusion, as long as they all reach the same end.

Whatever appeal there may be to petitioner's proposed rule may stem from a sense of concern about a verdict that is based on differing views by the jurors of different features of the case; the notion may be that if the jurors cannot reach consensus as to the theory of liability or the details of the case, perhaps there is something doubtful about their announced consensus as to the result.[5] As the example above shows, however, there are many instances in which jurors may take different views of the evidence, or even adopt different permissible theories of liability, without having any lack of confidence on the ultimate

[5] We take this to be the point of petitioner's argument (Pet. Br. 19) that if six jurors accepted the premeditation theory and six accepted the felony-murder theory, "the cumulation of two less than majority votes by the jury would require a conviction despite the lack of any basis for confidence that even one more juror believed than disbelieved a set of facts necessary to establish petitioner's guilt of first degree murder." This argument, however, is beside the point. It does not matter that half the jurors may have endorsed one theory of liability while the other half endorsed another, any more than it would matter that half the jurors in a bank robbery case believed that the defendant was the lookout and the other half believed he was the person who entered the bank. The defendant is equally guilty of bank robbery regardless of which role he played, just as petitioner is equally guilty of first degree murder regardless of how he committed that crime.

question of guilt. Indeed, petitioner's prosecution is a good case in point. The circumstantial evidence at trial left it unclear exactly what happened when petitioner encountered Grove on or about August 1, 1978, near Prescott, Arizona, but the evidence left little room for doubt that petitioner either strangled Grove himself or participated in the robbery of Grove, in the course of which Grove was killed. Thus, whatever doubts particular jurors may have had about the correct theory of liability or the details of how the killing occurred, the evidence that petitioner committed the crime of first degree murder was compelling. In such a setting, a requirement of jury agreement on matters other than the ultimate question of the commission of the offense would only have the effect of decreasing the likelihood of the jury's reaching a verdict despite its agreement that the defendant was guilty of the crime charged.

4. The issue presented in this case has been the subject of a number of state court decisions, most of which have held that the jurors need not be instructed that they must agree on whether a defendant committed premeditated or felony murder.[6] Although to our knowledge the precise

[6] *Gray* v. *State*, 463 P.2d 897, 910-911 (Alaska 1970); *People* v. *Chavez*, 37 Cal. 2d 656, 234 P.2d 632 (1951); *People* v. *Travis*, 170 Ill. App. 3d 873, 525 N.E.2d 1137 (1988), cert. denied, 489 U.S. 1024 (1989); *State* v. *Fuhrmann*, 257 N.W.2d 619 (Iowa 1977); *State* v. *Wilson*, 220 Kan. 341, 552 P.2d 931 (1976); *Commonwealth* v. *Devlin*, 335 Mass. 555, 141 N.E.2d 269 (1957); *People* v. *Embree*, 70 Mich. App. 382, 246 N.W.2d 6 (1976); *People* v. *Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903); *Rhea* v. *State*, 63 Neb. 461, 88 N.W. 789 (1902); *State* v. *Osborne*, 49 Ohio. St. 2d 135, 359 N.E.2d 78, 85 (1976); *James* v. *State*, 637 P.2d 862 (Okla. 1981); *Newsted* v. *State*, 720 P.2d 734 (Okla.), cert. denied, 479 U.S. 995 (1986); *State* v. *Hazlett*, 8 Or. App. 44, 492 P.2d 501 (1972); *State* v. *Tillman*, 750 P.2d 546 (Utah 1987); *State* v. *Ellison*, 36 Wash. App. 564, 676 P.2d 531 (1984). Contra *State* v. *Jones*, 193 Conn. 70, 475 A.2d 1087 (1984); *People* v. *Olsson*, 56 Mich. App. 500, 224 N.W.2d 691 (1974).

issue presented here has not been the subject of any published federal court decision, several decisions of this Court in analogous settings suggest that the rule petitioner proposes is not required either by the Constitution or (in federal cases) by principles of federal criminal procedure.

In *Andersen* v. *United States*, 170 U.S. 481 (1898), this Court sustained a capital conviction of murder against challenges based on uncertainty concerning the cause of death. The Court rejected the argument that the count in the indictment on which the verdict was based was duplicitous because it charged that death occurred through both shooting and drowning. It was immaterial to the validity of the conviction, the Court held, whether death was caused by one means or the other. *Id.* at 500. The Court likewise considered it immaterial that the cause of death was not established at trial. "[T]he Government was not required to make the charge in the alternative and elect to proceed in respect of one means of death rather than the other where the murderous action was continuous." *Id.* at 504. See also *St. Clair* v. *United States*, 154 U.S. 134, 145-146 (1894). By rejecting any requirement that the government satisfy the jury as to means by which the defendant committed the murder, *Anderson* undermines petitioner's claim that the jury must be unanimous as to the means by which petitioner committed the offense of first degree murder.

The result in *Borum* v. *United States*, 284 U.S. 596 (1932), is also contrary to petitioner's position. In *Borum*, the Court sustained the capital conviction of three co-defendants for first degree murder under a count in an indictment that "alleged that the weapon was held by one of the defendants but his name was to the grand jurors unknown." *Ibid.* Each of the defendants was acquitted of the charges in three other counts of the indictment, which were identical except that they named each of the defend-

ants in turn as the one who held the murder weapon. *Ibid.* It was therefore clear, as the government argued, that

> [t]he jury's verdict on this indictment [was] to be interpreted as their statement that they were not convinced beyond a reasonable doubt that any particular defendant held the gun, but that they were convinced beyond a reasonable doubt that some one of the three defendants did hold the gun.

Id. at 597. By sustaining the convictions, the Court in *Borum* made clear that it was unnecessary for the jury to agree on the means by which the offense was committed, *i.e.*, which defendant held the gun.[7] See also *United States* v. *McGuire*, 744 F.2d 1197 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985); *United States* v. *Zeidman*, 540 F.2d at 317 ("Nor can the defendants claim prejudice because they are uncertain whether the jury convicted them of defrauding the creditor or the debtor. As in the case of a statute which can be violated in different ways, it is sufficient to convict if the jury believes that at least one of the acts of fraud was committed.").

5. Relying on *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), petitioner contends (Pet. Br. 8) that felony murder and premeditated murder must be considered

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[7] The Court in *Borum* did not articulate the basis for its decision, probably because the case was before the Court on a certificate from the Court of Appeals of the District of Columbia. 284 U.S. at 596. The question certified was whether the judgment entered upon the verdict on the fourth count could be sustained "in view of the acquittal of each and all of the defendants of the charge of murder in the first degree as contained in the first three counts of the indictment." *Ibid.* The Court answered this question " 'Yes.' *Dunn* v. *United States*, [284 U.S. 390 (1932)]." That the Court considered the question to involve only arguably inconsistent verdicts, see *Dunn*, 284 U.S. at 394, strongly suggests that the Court considered the detail of which defendant held the murder weapon to be irrelevant.

"conceptually * * * different offenses" even though they are not so defined in the statute under which he was convicted. In *Gipson*, the Fifth Circuit reversed a conviction under 18 U.S.C. 2313, (1982), which provides:

> Whoever receives, conceals, stores, barters, sells or disposes of any motor vehicle or aircraft moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years or both.

The court held that the jury instructions were improper because they permitted the jury to convict the defendant "if each individual juror found that the defendant performed one of the six prohibited acts—receiving, concealing, storing, bartering, selling, or disposing." 553 F.2d at 458. The court believed that such a conviction would violate both the reasonable-doubt standard and the unanimity requirement embodied in Fed. R. Crim. P. 31(a). 553 F.2d at 456-458. In the court's view, the acts prohibited under the statute fell into "two distinct conceptual groupings; the first consisting of receiving, concealing and storing, and the second comprised of bartering, selling, and disposing." *Id.* at 458. Because there was evidence at trial suggesting that the defendant committed acts in each "conceptual grouping," *id.* at 459, the court concluded that the jury may not have agreed "as to just what [the] defendant did," *id.* at 457.

Petitioner's reliance on *Gipson* is misplaced for three reasons. First, the *Gipson* court's conclusion that Section 2313 contains, in effect, two distinct crimes, was a matter of statutory construction, not constitutional compulsion. Therefore, the same kind of analysis would not be applicable to a state statute that the state courts have held to constitute only a single offense.

Second, the analysis in *Gipson* would not necessarily produce the same result here, even if the analysis could be applied equally to a state statute. The court in *Gipson* made clear that it was addressing the situation in which "a criminal statute provides a number of ways of satisfying the *actus reus* element of an offense." 553 F.2d at 457.[8] That is not the situation here. Arizona's first degree murder provisions define a single *actus reus*: "the unlawful killing of a human being." Ariz. Rev. Stat. Ann. § 13-451 (1959 & Supp. 1973). See also Ariz. Rev. Stat. Ann. § 13-1105 (1989). Petitioner was charged with a single prohibited act, the murder of Lorimer Grove. Evidence at the trial concerned only a single set of events, those relating to petitioner's encounter with Grove on or about August 1, 1978. Whatever the precise outlines of a "distinct conceptual grouping" of acts as envisaged by the *Gipson* court, this case clearly involved no more than one such "grouping." The verdict therefore was not reversible under the reasoning of *Gipson*, even assuming that *Gipson* was correctly decided.

Finally, we believe that the court's analysis in *Gipson* was incorrect. As explained above, the reasonable-doubt standard requires only that the jury agree on the elements of the crime that the legislature has created. The *Gipson* court therefore should have decided, as a matter of statutory interpretation, whether 18 U.S.C. 2313 (1982) constitutes a single offense that can be committed through any

[8] See also 553 F.2d at 456-457 (posing as question before the court: "Where a single criminal statute prohibits a number of acts, and a finding by the jury that the defendant did any one of the prohibited acts is sufficient to convict him * * *, is the defendant's right to a unanimous verdict infringed if a guilty verdict is returned when all members of the jury agree that the defendant performed one of the prohibited acts, but disagree as to which of the acts he performed?") (footnote omitted).

of the prohibited acts (in which case jury agreement on which of the acts Gipson committed was unnecessary) or instead creates more than one offense (in which case the indictment charging more than one act in a single count would be subject to challenge as duplicitous).

Rather than taking this approach, the court in *Gipson* improperly relied on its own sense of "distinct conceptual groupings" to decide which factual elements were "necessary to constitute the crime with which [the defendant] [wa]s charged." *In re Winship*, 397 U.S. at 364. The court justified that approach by reference to a hypothetical "traffic control statute" prohibiting "(a) speeding, (b) driving without lights at night, (c) making a turn from the wrong lane, and (d) failing to use turn signals." *Gipson*, 553 F.2d at 458 n.8. The court believed that a defendant could not be convicted under such a statute if, on the twelve-person jury, each of four sets of three jurors concluded that the defendant committed a different one of the four prohibited acts. *Ibid.*

The court's analysis of the hypothetical traffic statute would be correct if, as the distinctive nature of the four unlawful acts suggests, the statute was intended to create four separate offenses that could be separately charged and punished. In that circumstance, a count charging all four offenses would be duplicitous, and before convicting on any one of the four offenses, a jury would have to agree that the defendant had committed that particular offense. On the other hand, the *Gipson* court's analysis would break down if the hypothetical traffic statute were intended to define a single crime, such as reckless driving, which could be proved by one or more of the four component types of driving infractions. In that setting, the jury would be required to agree only as to whether the defendant was guilty of reckless driving, and it would not matter

at all that different jurors reached that verdict based on their consideration of different infractions among those listed in the statute.[9]

The Arizona first degree murder statute is like the hypothetical reckless driving statute discussed above. It defines a single crime that can be committed in several different ways. For that reason, the requirements of jury unanimity and the reasonable-doubt standard were satisfied when the jury was instructed that it must agree, beyond a reasonable doubt, that petitioner committed the crime with which he was charged – first degree murder. The Constitution does not require that the jury also agree on the means by which petitioner committed that offense, whether through premeditated killing or felony murder.

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[9] As the example of the "reckless driving" statute demonstrates, the analysis in *Gipson* seems driven by a largely irrelevant matter of nomenclature – the reference in Section 2313 to a series of specific acts. As one commentator remarked, "If the statute had simply prohibited 'trafficking' in stolen vehicles, the court of appeals would probably not have found that a subdivision of the statute into two 'conceptual groupings' was necessary to assure that the jury determined just what the defendant did." Truitt, *Patchwork Verdicts, Different-Juror Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues*, 36 Okla. L. Rev. 473, 548-549 (1983).

CONCLUSION

The judgment of the Arizona Supreme Court should be affirmed.

Respectfully submitted.

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DECEMBER 1990

U.S. GOVERNMENT PRINTING OFFICE 1990 – 282 061/20264